FILED BY CLERK
JAN 11 2010
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. MILES L. KAUFMAN, Appellant.	2 CA-CR 2009-0138 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20074582

Honorable John S. Leonardo, Judge

AFFIRMED

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H O W A R D, Chief Judge.

¶1 After a jury trial, appellant Miles Kaufman was convicted of possession of a narcotic drug and possession of drug paraphernalia. The trial court sentenced him to concurrent, presumptive terms of imprisonment, the longer of which was ten years. On appeal, Kaufman argues the trial court erred in precluding the admission of hearsay statements made by a third party to an officer at the time of his arrest. He also argues his indictment was duplicitous. For the reasons stated below, we affirm.

Facts and Procedural History

¶2 "We view the facts in the light most favorable to sustaining the convictions." *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). Tucson Police Officer Rivera saw a woman, later identified as L.H., walking on a busy street, waving at passing cars. Kaufman, drove his car down a nearby street; L.H. approached the car and got into the front passenger seat. Suspecting prostitution, Rivera followed Kaufman's car and witnessed behavior that led him to believe L.H.'s hands were "doing something" in Kaufman's lap as he drove.

¶3 Rivera notified other officers who intercepted Kaufman's car at a nearby intersection. As Kaufman stopped his vehicle, officers saw him move his hands from the steering wheel to reach first into his lap and then to the floorboard area as he stopped his car. After approaching the car, officers also saw a used crack pipe on the floorboard. The officers searched the car and found rocks of crack cocaine on the driver's side floorboard, a spoon with cooked residue underneath the driver's seat, and other items typically used to consume illegal drugs.

¶4 Kaufman was charged with and convicted of possession of a narcotic drug and possession of drug paraphernalia. This appeal followed.

Precluded Evidence

¶5 Kaufman first argues the trial court erred in precluding as inadmissible hearsay statements his passenger, L.H., had made to police, contending the statements were admissible under Rules 803(3), (24), and 804(b)(3), Ariz. R. Evid. We review a court's decision to exclude evidence for an abuse of discretion. *State v. Davis*, 205 Ariz. 174, ¶ 23, 68 P.3d 127, 131 (App. 2002); *see also State v. Fulminante*, 161 Ariz. 237, 252, 778 P.2d 602, 617 (1988) (reviewing trial court's exclusion of third-party culpability evidence for abuse of discretion).

¶6 Before Kaufman was arrested, L.H. allegedly had told a police officer that she had "had struggles with crack." Because L.H. was unavailable to testify at trial, Kaufman sought to introduce her statements through the officer to show that the drugs found in his car did not belong to him. The state filed a motion in limine to preclude L.H.'s statement. The trial court granted the motion, precluding Kaufman from introducing the statement on the ground it was inadmissible hearsay.

¶7 Hearsay is an out-of-court statement offered to "prove the truth of the matter asserted." Ariz. R. Evid. 801(c). It is "not admissible except as provided by applicable constitutional provisions, statutes, or rules." Ariz. R. Evid. 802. Hearsay that "raises nothing more than self-serving suspicion of third party involvement" is generally insufficient to support a third-party culpability defense. *State v. Hoskins*, 199 Ariz. 127, ¶ 64, 14 P.3d 997, 1013-14 (2000).

¶8 Rule 803, Ariz. R. Evid., sets forth exceptions to Rule 802's preclusion of hearsay. Rule 803(3) provides that a statement about the declarant's state of mind may be admitted as an exception to the hearsay rule. But L.H.'s statement does not fall within this exception because "[t]he state-of-mind exception does not include a statement of memory or belief to prove a fact remembered or believed." *State v. Barger*, 167 Ariz. 563, 566, 810 P.2d 191, 194 (App. 1990) (statements to police that declarant felt threatened not within state of mind exception to hearsay rule where they were made the day after the incident and concerned past mental condition). A discussion of L.H.'s struggles with drugs concerns her past actions, not her then-existing state of mind.

¶9 Nor do L.H.'s statements fall under Rule 803(24), which permits a trial court to admit a hearsay statement that does not fall within the specified exceptions under certain circumstances and if certain conditions are met. The trial court must determine the statement has "equivalent circumstantial guarantees of trustworthiness," and

> (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Ariz. R. Evid. 803(24).

¶10 The trial court did not abuse its discretion by excluding these ambiguous statements from a person of questionable background, which lacked any circumstantial guarantees of trustworthiness. Furthermore, the trial court properly found the probative value of this evidence was substantially outweighed by the danger of confusion of the

issues. The evidence, therefore, does not meet the balancing test of Rule 403, Ariz. R. Evid.

¶11 Kaufman also argues that the trial court abused its discretion by "employing an incorrect legal standard" in determining the admissibility of this third-party culpability evidence under the "reverse Rule 404(b)" exception for evidence of other crimes, wrongs or acts. *See* Ariz. R. Evid. 404(b). But Kaufman did not request that L.H.'s statement be admitted on this ground below; he has, therefore, forfeited his right to seek relief on appeal absent fundamental, prejudicial error. *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). And, because Kaufman does not argue on appeal that the error was fundamental, and because we find no error that can be so characterized, the argument is waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (fundamental error argument waived on appeal if not argued); *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore fundamental error if it sees it). In any event, Kaufman has not provided any authority that "reverse Rule 404(b)" evidence is not subject to the hearsay rules.

Duplicitous Indictment

¶12 Kaufman also argues that count two of the indictment, which charged him with possession of drug paraphernalia, was duplicitous because it "brought two charges in a single count," making it possible "that the jury failed to return a unanimous verdict." Count two alleged that Kaufman "unlawfully possessed[] drug paraphernalia, to wit: pipe and/or spoon."

¶13 As a preliminary matter, we note that Kaufman conflates the argument that a charge is duplicitous with the argument that the indictment is duplicitous. A charge is duplicitous when the charging document alleges a single criminal act but the evidence establishes multiple criminal offenses to prove the defendant's guilt on that single charge. *See State v. Klokic*, 219 Ariz. 241, ¶ 12, 196 P.3d 844, 847 (App. 2008). A duplicitous indictment, on the other hand, means that the defendant has been charged with two or more offenses in a single count. *Id.* ¶ 10.

¶14 Nonetheless, a duplicitous charge and a duplicitous indictment create the same hazards—both provide inadequate notice of the charge against which the defendant must defend, create the potential for a non-unanimous verdict, and hamper the precise pleading of prior jeopardy in any future prosecution. *Id.* ¶ 12. We will therefore review both claims.

¶15 We first address Kaufman's contention that the indictment was duplicitous. Kaufman did not object to the indictment twenty or more days before trial as required. *See* Ariz. R. Crim. P. 13.5(e), 16.1(b), (c); *State v. Anderson*, 210 Ariz. 327, ¶¶ 15-17, 111 P.3d 369, 377-78 (2005). "Failure to object to duplicity either prior to or during trial constitutes a waiver of that objection." *State v. Rushton*, 172 Ariz. 454, 455, 837 P.2d 1189, 1190 (App. 1992).

¶16 This case illustrates the reasoning behind the waiver in Rule 13.5(e). "We require pretrial objections to an indictment in order to allow correction of any alleged defects before trial begins. If a defendant makes a timely objection, the State can remedy any duplicity by filing a new indictment charging multiple counts, thus exposing

defendant to multiple penalties." *Anderson*, 210 Ariz. 327, ¶ 17, 111 P.3d at 378. By failing to object timely to a duplicitous indictment, a defendant could gain an unfair advantage by avoiding the possibility of multiple punishments by denying the state an opportunity to correct the faulty indictment. *Id*. Thus, if the defendant were permitted to raise the issue on appeal, he essentially would be able to "have his cake and eat it too" by "attempt[ing] to avoid any punishment at all." *Id*.; *see also Rushton*, 172 Ariz. at 456, 837 P.2d at 1191. Kaufman's untimely challenge to his indictment is therefore precluded. *Anderson*, 210 Ariz. 327, ¶ 16, 111 P.3d at 378; *see also* Ariz. R. Crim. P. 13.5(e) (precluding any motion alleging a defect in indictment not timely filed).

¶17 Kaufman attempts to distinguish his case by claiming that the defendant in *Anderson* "clearly invited the error, whereas here there is no evidence that . . . Kaufman was aware of a legal error [in his indictment] in the first place." In *Anderson*, the defendant objected to the indictment before his first trial and did not renew this objection before his second trial, instead raising the issue in a motion for acquittal. 210 Ariz. 327, ¶¶ 14-15, 111 P.3d at 377. Here, as in *Rushton*, although Kaufman did not have two trials, he knew of the indictment prior to trial, "had ample opportunity to raise the issue in the trial court," and thus his "failure to object to the indictment indicates a risk he was willing to take." 172 Ariz. at 456, 837 P.2d at 1191. Kaufman "simply gambled and lost and cannot now be heard to complain." *Id*.

¶18 With respect to Kaufman's claim that the state brought forward evidence on a duplicitous charge, he also did not raise this claim below, and we therefore review this claim only for fundamental error. *See State v. Davis*, 206 Ariz. 377, ¶ 62, 79 P.3d 64, 77

(2003). Kaufman bears the burden of showing not only that fundamental error occurred, but also that actual prejudice resulted. *See State v. Valverde*, 220 Ariz. 582, ¶ 12, 208 P.3d 233, 236 (2009). To demonstrate prejudice, Kaufman must show that absent any error, "a reasonable jury . . . could have reached a different result." *See Henderson*, 210 Ariz. 561, ¶ 27, 115 P.3d at 609.

¶19 Kaufman does not provide any argument as to whether a reasonable jury could have reached a different result; he merely alleges there is "more than just a 'real possibility' that the jury failed to return a unanimous verdict" because part of the jury could have found him guilty of possession of the pipe while the rest of the jury could have found him guilty of possession of the spoon. But both items were found at the same time as the cocaine and each other, in the driver's area of Kaufman's car, which Kaufman was driving. Kaufman has therefore not met his burden of proving the jury could have reached a different result on either charge had count two not charged him with possession of a pipe and/or a spoon.

¶20 Kaufman's case is distinguishable from *Davis*, 206 Ariz. 377, 79 P.3d 64, on which he relies. Davis was charged with four counts of sexual misconduct with a minor. *Id*. ¶ 7. One of those counts charged him with having sex with the victim "on or about the 18th day of January." *Id*. ¶ 51. At trial, the victim testified that she had engaged in sex with Davis twice, once in the middle of January and once at the end of the month. *Id*. A doctor who had examined the victim also testified that the victim exhibited signs that she had had sex within the week, "which would have been the end of January." *Id*. The jury therefore "heard evidence that Davis had sex with [the victim] on two

separate occasions, occurring at least eleven days apart" although the verdict form on the charge did not specify the date of the offense. *Id*. Accordingly, Davis argued that his charge was duplicitous because some jurors might have found he had sex with the victim on January 18th while others might have concluded he had done so at the end of January. *Id*. ¶ 52. Our supreme court agreed. *Id*. ¶ 53.

¶21 In determining that Davis's charge was duplicitous, the court noted that the offenses occurred eleven days apart and that Davis had offered more than one defense. *Id*. ¶ 58. The court also distinguished Davis's case from *State v. Schroeder*, 167 Ariz. 47, 804 P.2d 776 (App. 1990), in which the state had introduced evidence of seven counts of fondling to support one charge of sexual abuse. *Davis*, 206 Ariz. 377, ¶¶ 56-59, 79 P.3d at 76-77. The court found in *Schroeder* that the charge of sexual abuse was not duplicitous because it rested on a determination of credibility. 167 Ariz. 47, 53, 804 P.2d at 782.

¶22 Unlike the offenses in *Davis*, which occurred eleven days apart, the offenses in this case occurred on a single date. Moreover, like *Schroeder*, the acts occurred simultaneously and the question was one of credibility. We conclude this case is more like *Schroeder* and that Kaufman's reliance on *Davis* is misplaced. "[U]nder the circumstances in this case, we find [Kaufman] was not prejudiced."[1] *Id*.

[1]Kaufman finally argues, that had count two of his indictment specified a single charge, the jury "may have returned an acquittal as to Count One." Because we have rejected his claim as to count two we need not address this argument.

Conclusion

¶23 We affirm Kaufman's convictions and the sentences imposed.

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

PHILIP G. ESPINOSA, Presiding Judge

PETER J. ECKERSTROM, Judge